No. 85-1977

In the Supreme Court
OF THE
United States

October Term, 1985

Supreme Court, U.S.
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OIL INSURANCE LIMITED,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,
and
A.I.U. INSURANCE COMPANY, AMERICAN HOME INSURANCE COMPANY, BIRMINGHAM INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FROUDE AND COMPANIES, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MISSION INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, SUN INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

A. May an insurance company with extensive contacts with California avoid that state's exercise of jurisdiction because it was deliberately established to appear to be doing business only in Bermuda?

B. May an arbitration clause in a contract between an insurer and an insured be enforced to deprive third parties of a forum for resolution of disputes between such third parties and the insurer?

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OIL INSURANCE LIMITED,
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vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,

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A.I.U. INSURANCE COMPANY, AMERICAN HOME INSURANCE COMPANY, BIRMINGHAM INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FROUDE AND COMPANIES, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MISSION INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, SUN INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Respondents A.I.U. Insurance Company, et al., (the "Interested Defendants") pray that the Petition for Writ

of Certiorari be denied and that no review be granted of the decision of the Court of Appeal of the State of California, First Appellate District, Division Three, entered in this proceeding on February 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three ("the Court of Appeal"), issuing a peremptory writ of mandate ordering the respondent Superior Court in and for San Mateo County ("the Superior Court") to vacate its order quashing service of process upon Oil Insurance Limited, ("O.I.L.") is reported at 177 Cal. App. 3d 381, 222 Cal. Rptr. 880 ("the Decision"). The Decision is set forth in the Appendix to this Opposition Brief at 1a-13a. The Court of Appeal's unreported opinion denying rehearing is set forth at 14a, and the order of the California Supreme Court denying O.I.L.'s petition for review is set forth at 15a.

STATEMENT OF THE CASE

Shell Oil Company ("Shell") has been sued by governmental agencies and others for clean-up costs of dump sites Shell has been accused of polluting with toxic chemicals. The dump sites are located in Fullerton, California and Denver, Colorado, and the estimated cost of cleaning them exceeds two billion dollars. In October 1983, Shell filed a declaratory relief action in the Superior Court against some 250 of its comprehensive general liability insurance carriers from 1942 to the present. Shell alleges that the policies provide coverage for indemnification and defense costs.

The only insurance company which Shell did not sue was its own captive insurer, O.I.L., which has provided

Shell with comprehensive general liability coverage since 1976. Every insurance policy issued to Shell excludes coverage for pollution, with one exception: the O.I.L. policies issued to Shell expressly cover liability arising from pollution.

In the Petition, O.I.L. sets forth an understandably narrow interpretation of its policies, in an effort to explain Shell's selective omission of O.I.L. from the declaratory relief action. The actual reason, however, is that O.I.L. is a captive in large part of Shell. Recovery from Shell would require contribution to O.I.L. by Shell, a result which Shell would naturally prefer to avoid.

The Interested Defendants cross-complained against O.I.L., and seek a declaration that any coverage provided by them is in excess to that of O.I.L., i.e., such coverage is inapplicable until the limits of the O.I.L. policies are exhausted. O.I.L. moved to quash service. Shell (represented by the same attorneys who represent O.I.L.) submitted papers in support of O.I.L.'s motion. The Superior Court granted the motion, but the Court of Appeal, in a unanimous and well-reasoned decision, reversed the order. O.I.L.'s subsequent Petitions for Rehearing and Petition for Review to the California Supreme Court were also unanimously denied.

SUMMARY OF ARGUMENT

The Court of Appeal correctly determined that O.I.L. has sufficient minimum contacts with California to warrant the exercise of jurisdiction.

O.I.L. proffers two reasons for the grant of certiorari. First, O.I.L. contends that this Court's disposition of *Asahi Metal Industry Co. v. Superior Court,* 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) *cert. granted,* 106 S. Ct. 1258 (1986) (*"Asahi"*) will require reversal of the

Decision. Second, O.I.L. argues that a clause in the insurance contracts which provides for arbitration of disputes between O.I.L. and Shell precludes exercise of jurisdiction in an action against O.I.L. by any person not a party to the insurance contract. Neither argument meets the standards of this Court's Rule 17, and a writ of certiorari should not issue.

REASONS FOR DENYING THE WRIT

I

O.I.L. HAS MORE THAN MINIMUM CONTACTS WITH CALIFORNIA, AND THE EXERCISE OF JURISDICTION WAS PROPER.

The undisputed facts before the Court of Appeal included the following.[1] O.I.L. is an insurance company which provides commercial insurance for 34 insureds, each of which, like Shell, is a large petroleum company. O.I.L.'s policies cover risks located worldwide. The California based insured-owners of O.I.L., which control approximately 16% of O.I.L.'s voting shares, are three of the largest oil companies in the world: Atlantic Richfield Company, Chevron Corporation and Unocal Corporation (formerly Union Oil). Since its creation in 1972, O.I.L. has issued and sent insurance policies to these three owner-insureds in California. Many of O.I.L.'s owner-insureds, including Shell, have substantial assets and operations in California which are covered under O.I.L. policies.

The extent of O.I.L.'s economic activity within California has been enormous. Since 1972, O.I.L. has been paid

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[1]The references in this section are supported by the Decision or the Supplemental Affidavit of Charles Bailey, President of O.I.L., submitted in support of O.I.L.'s motion to quash.

the staggering total of $145,314,658 in premiums directly from its California headquartered owner-insureds (an average of over $11,000,000 in annual premium income). O.I.L. has also received $38,000,000 in reinsurance premiums from the captive insurer of Occidental Petroleum Company, a California company. Thus, since 1972, O.I.L. has collected gross revenues in the form of insurance and reinsurance premiums of approximately $186,000,000 directly or indirectly from California corporations. Since O.I.L.'s premium revenue is slightly in excess of one billion dollars, the premiums paid directly or indirectly by California corporations constitute almost 20% of the total premiums received by O.I.L.

O.I.L. has also paid substantial amounts for California based losses. Since 1972, O.I.L.'s owner-insureds have submitted claims for losses occurring in California aggregating $34,681,000 and O.I.L. has made payments for such claims in the amount of $25,681,000. O.I.L. sent agents to California in connection with the adjustment of claims for such losses as a part of the normal course of its insurance business.

Most of these facts were stipulated and they clearly demonstrate that O.I.L. has had more than sufficient minimum contracts with California to support the exercise of jurisdiction over O.I.L.

II

THIS COURT'S GRANT OF CERTIORARI AND DISPOSITION OF ASAHI HAS NO BEARING ON THE CASE AT BAR, AS THE DECISION IN THE COURT BELOW WAS NOT BASED OR PREMISED UPON ASAHI BUT ON FACTUALLY SIMILAR INSURANCE CONTRACT CASES

O.I.L. argues that the Decision is based or premised upon *Asahi*, and that *Asahi's* reversal would *"a fortiori"* mandate reversal of the Decision. The argument is wholly unsupported, and in fact the Court of Appeal did not "rely" on *Asahi* and only mentioned it twice. The Decision first referred to *Asahi* for the limited purpose of citing *Asahi's* quote from a federal court decision interpreting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). The passage from the Decision stated, after quoting from *World-Wide Volkswagen:*

> "In the latter case, the manufacturer " 'benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents.' " *(Asahi Metal Industry Co., Ltd. v. Superior Court* (1985) 39 Cal. 3d 35, 45 quoting from *De James v. Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 285.)"

The Decision then noted that while there is an abundance of jurisdictional cases in the products liability context such as *Asahi,* cases applying the minimum contacts test to insurance cases are comparatively scarce. These two oblique references to *Asahi* constituted the sum total of the Court of Appeal's mention (let alone "reliance") upon *Asahi.*

Asahi involved facts and law entirely different than in the present case. In *Asahi,* a defendant in a products liability case cross-complained against a Japanese manu-

facturer which made no direct sales in California. *Asahi* turned on an analysis of cases such as *World Wide Volkswagen, supra,* in which manufacturers deliver their products into the stream of commerce. The Court of Appeal did not analyze or apply the principles set forth in *Asahi* and instead discussed at length three insurance contract jurisdiction cases: *Travelers Health Assn. v. Virginia* 339 U.S. 643 (1950); *McGee v. International Life Ins. Co.* 355 U.S. 220 (1967); and *McClanahan v. Trans-America Ins. Co.* 149 Cal. App. 2d 171 (1957).

In *Travelers,* a Nebraska mail-order health insurer wrote policies to Virginia insureds. This Court upheld Virginia's exercise of jurisdiction, although there were no actual transactions within the state, in part because the issuance and delivery of insurance certificates created "continuing obligations" between the company and the insured.

In *McGee,* this Court held that a nonresident insurance company's contact with the forum state need not be systematic and continuous so long as it amounts to "purposeful contact" with the state. In *McClanahan,* the court held that the act of insuring motorists who sometimes operated their vehicles in California was sufficient economic presence to warrant jurisdiction, even though the lawsuit was not instituted by the insured.

Both *Travelers'* "continuing obligations" and *McGee's* "purposeful contact" turned on the facts that insurers drew premiums from the forum states, sent adjustors to investigate claims there, and knew the forum states to be the likely residence of witnesses to accidents. The Court of Appeal recognized that the same facts exist in the present case, as O.I.L. has collected $145 million in premiums from California, and has sent investigators there to settle large claims.

The Court of Appeal considered the principles of these three cases to apply to "the insurer for an oil company with significant assets and activities in California". In response to O.I.L.'s argument that it did not expect to be haled into court in California, the Court of Appeal correctly observed that the pertinent issue was not O.I.L.'s subjective anticipation, but what it reasonably should have anticipated. The Court held:

> "Comparing O.I.L.'s contacts with those of insurers of *McGee* and *McClanahan,* it is apparent that jurisdiction over O.I.L. is warranted. In *McGee* the insurer's only contact with California was an insurance contract sent to a California resident, followed by the insured's payment of premiums. Here the insurer has insured three major California-based oil companies and the California operations of numerous other companies. It has received over $145 million in premiums from the California companies and has made payments of over $25 million for California losses. The mere device of entering these contracts in Bermuda rather than mailing the agreements to the insureds cannot insulate O.I.L. from the impact of these activities upon California."

The Court of Appeal concluded that O.I.L.'s contacts with California were even stronger than those in *McClanahan* because O.I.L. insures stationary assets and activities located in the state, and has greater reason to expect California losses.

The Decision is also consistent with and supported by recent federal authority. In *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.,* 784 F.2d 1392 (9th Cir. 1986), a group of physicians established a self-funding indemnity insurance company (the "Fund") in the Cayman Islands. The Fund was incorporated in the Cayman Islands, and its sole office was maintained there. All

directors' meetings, all transactions and communications, the issuance and delivery of insurance policies and the payment of premiums were conducted in the Cayman Islands. The insurance contract provided that it would be governed by Cayman Island law, and disputes between the insured and the Fund were to be resolved through binding arbitration. Even so, the Court held that, under California law, it is not necessary for a transaction physically to take place in California to meet the minimum contacts requirement:

> "Thus, despite the formal manner in which the transactions between the Fund and its insureds were conducted, as a matter of commercial actuality and of placing substance over form, we find that the Fund's outside activity was 'purposefully directed' to a participation in the California insurance market."

Id. at 1398.

The Court of Appeal relied upon well-settled authority to support the Decision, and *Asahi* was not a significant basis of the Decision. The Interested Defendants therefore submit that the disposition of *Asahi* will have no effect on the Decision and provides no grounds to support the Petition.

III

THE ARBITRATION CLAUSE ISSUE IS NOT A JUSTICIABLE CONTROVERSY FOR REVIEW BECAUSE IT RAISES NO SIGNIFICANT QUESTION OF DUE PROCESS AND PRESENTS NO CONFLICT IN STATE OR FEDERAL LAW.

O.I.L. argues that an arbitration clause in the O.I.L.-Shell insurance contract should prevent the Interested Defendants from maintaining an action against O.I.L. in California. The Decision held that the arbitration provi-

sion in the Shell-O.I.L. contract cannot be permitted *ipso facto* to "deprive insureds, beneficiaries, persons injured by the injureds' activities, or other potential plaintiffs of a California forum for suit."

O.I.L. proffers no reason for review of this aspect of the Decision, and does not cite a single case where a non-party to a contract is bound by the provisions of the agreement. O.I.L. refers to an insurance "crisis" but offers no demonstration that the purported crisis will be abated if off-shore captive insurers such as O.I.L. can avoid the courts of American states where their insureds transact business.

As this Court is well aware, considerations governing review of state court rulings provide that certiorari is proper:

> "(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." (Sup. Ct. R. 17)

O.I.L. has not shown the Decision to be in conflict with the decision of another state court of last resort or of a federal court of appeals. In fact, the Decision is consistent with the latest Ninth Circuit case addressing the issue, *Haisten, supra.*

O.I.L. argues that "arbitration and forum selection clauses merit far greater deference in the context of international commerce". Of course, the fact that companies of diverse countries are involved confers no talis-

manic significance that either binds nonparties to an agreement or insulates a company with the requisite minimum contacts from jurisdiction. O.I.L.'s references to "international commerce" are to admirable notions, but they obviously have no application here.

O.I.L.'s novel theory that an arbitration clause in an agreement between an insured and its insurer determines jurisdiction for all possible litigants is completely unsupported by statutory or decisional law. The Court of Appeal fully considered and correctly decided the matter; O.I.L.'s arguments are without merit.

CONCLUSION

The writ of certiorari should not issue.

Dated: June 27, 1986
Los Angeles, California

Respectfully submitted,

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Decision of the Court of Appeal of the State of California, First Appellate District, Division Three, Issuing a Peremptory Writ of Mandate

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

First Appellate District, Division Three

A032845

(Super Ct. No. 278953 San Mateo County)

A.I.U. INSURANCE COMPANY et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN MATEO COUNTY,

Respondent,

OIL INSURANCE LIMITED,

Real Party in Interest.

This petition challenges a trial court ruling quashing service of process for insufficient contacts to justify long-arm jurisdiction over a Bermuda insurance company. It raises the question of whether the insurer of very substantial California risks and property may avoid the jurisdiction of California courts by structuring its affairs so that most contacts with the insureds take place outside of the United States. We conclude that the insurer's contacts with California suffice for exercise of jurisdiction by the California courts.

The states of California and Colorado, the United States Environmental Protection Agency and the United States Army are suing Shell Oil Company (Shell) for damages and clean-up costs for pollution of the Rocky Mountain Arsenal in Colorado and of a toxic waste site near Fullerton, California. Damages of around $2 billion are sought for pollution alleged to have taken place over the last 35 to 40 years, primarily at the Colorado site. Shell has sued some 250 insurance companies in San Mateo County Superior Court, seeking declaratory relief concerning coverage by various primary and excess general liability policies held by Shell and its corporate predecessors. Some of the defendants have cross-complained against Oil Insurance Limited (O.I.L.), a mutual insurance company created by about 35 major oil companies, including Shell. The cross-complaints contend that O.I.L.'s policy, issued in 1976, covers some or all of the damages.

O.I.L., a Bermuda-based company, moved to quash service for lack of personal jurisdiction over the corporation. The motion was granted, leading to this petition for writ of mandate filed on behalf of a number of the cross-complaining insurance companies.

"Where a defendant properly moves to quash out-of-state service for lack of jurisdiction, the burden is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. [Citation.] When the evidence of jurisdictional facts, which may be in the form of declarations, is in conflict the trial court's resolution thereof will not be disturbed if supported by substantial evidence. [Citations.] On review of an order granting a motion to quash, the facts must be viewed most favorably to the defendant. [Citations.]" (*Messerschmidt Development Co.* v. *Crutcher Resources Corp.* (1978) 84 Cal. App. 3d 819, 825.)

For the most part, the facts are not in dispute, most of the operative facts having been provided by stipulation. The facts, viewed most favorably to O.I.L., show that O.I.L. is a mutual insurance company based in and incorporated under the laws of Bermuda. Its sole office is there and its officers and employees are all residents of Bermuda. All of its insurance policies have been issued in Bermuda, and O.I.L.'s shareholders' agreement, pursuant to which the policies are issued, has been signed by each shareholder/policyholder in Bermuda or in another location outside the United States. O.I.L. is not and has not been taxed by the United States or any state or any state of the United States.

During the formation of O.I.L. in 1972, the five oil company representatives participating in its formation had contact with California. One was a California resident. Others communicated with him by letter and telephone. O.I.L. was created in part because of the reaction of traditional insurers to the Santa Barbara oil spill.

O.I.L.'s shareholders/policyholders are 35 large petroleum companies. In order to obtain insurance, a company must become a shareholder in O.I.L. and agree to the provisions of the shareholders' agreement. The terms of each insurance policy are prescribed by exhibits to the shareholders' agreement. The policies expressly provide that the only means for resolving disputes thereunder is by arbitration in London, applying New York law. In the 13 years of O.I.L.'s existence, no suit concerning a policy claim has ever been brought or threatened in a court in the United States or any foreign country. O.I.L. had not anticipated that it would be haled into court in California.

Three of O.I.L.'s shareholders/policyholders are major oil companies headquartered in California: Atlantic Richfield Company, Chevron Corporation, and Unocal Corporation. O.I.L. has sent copies of its policies of insurance

from Bermuda to these shareholders/policyholders in California, and it has received over $145 million in premiums from those three companies since 1972. The insurance policies sent to California were merely convenience copies, not binding contracts.

These California-based oil companies and other shareholders/policyholders of O.I.L. have substantial assets and insure substantial risks in California. However, O.I.L. provides world-wide coverage for its insureds calculated without regard to location of the various assets. Since its creation in 1972, O.I.L. shareholders/policyholders have submitted claims for losses in California totalling over $34 million, and O.I.L. has made payments of over $25 million for such claims. O.I.L. has sent persons from United States affiliates of nonexclusive agents to California in connection with the adjustment of claims for losses in California. Certain claims payments have been sent by wire transfer to banks located in California, and O.I.L. has received wire transfers of premium payments from one shareholder/policyholder's California bank account. Two members of O.I.L.'s board of directors are residents of California.

Less than 10 percent of O.I.L.'s shareholders/policyholders are headquartered in California, and less than 15 percent of the total premiums received by O.I.L. have been from California shareholders/policyholders. Only 3 of 188 claims made against O.I.L. have involved losses in California (two refinery fires and storm damage to an offshore oil facility).

Were O.I.L.'s Contacts with California Sufficient to Justify Long-Arm Jurisdiction?

By statute, "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ.

Proc., § 410.10.) Over 40 years ago, the United States Supreme Court explained that the due process clause of the Fourteenth Amendment of the United States Constitution bars the states from entering judgments affecting the rights or interests of a nonresident defendant absent such "minimum contacts" with the state that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.) In the intervening 40 years, elements of the "minimum contacts" test have been further refined, and the test has been generally liberalized due to the "fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (*McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 222-223.)

In spite of liberalization of the "minimum contacts" test, courts have not abandoned all restrictions on suing nonresident defendants. Thus, in *Hanson* v. *Denckla* (1958) 357 U.S. 235, 253, the court held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," and in *World-Wide Volkswagen Corp.* v. *Woodson* (1980) 444 U.S. 286, the court applied the "puposefully avails" standard to exempt from Oklahoma's jurisdiction defendants who had merely placed a Volkswagen in the stream of commerce by selling it in New York knowing that it might be driven in other states. The opinion distinguished a local

retailer or distributor from a major manufacturer or distributor who delivered its products into the stream of commerce "with the expectation that they will be purchased by consumers in the forum State." (*Id.* at p. 298.) In the latter case, the manufacturer "'benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents.'" (*Asahi Metal Industry Co., Ltd.* v. *Superior Court* (1985) 39 Cal.3d 35,45, quoting from *DeJames* v. *Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 285.)

Although there are many decisions applying the "minimum contacts" test to manufactured products (see *Asahi Metal Industry Co., Ltd.* v. *Superior Court,* supra, 39 Cal.3d 35, and cases cited therein), decisions concerning insurance contracts are scarce. In *Travelers Health Assn.* v. *Virginia* (1950) 339 U.S. 643, an early example, the court sustained Virginia's jurisdiction over a Nebraska insurer conducting a mail-order health insurance business. The insurer had signed up 800 Virginia members by encouraging members to recommend the association to friends and submit their names to the home office, and by then mailing solicitations and applications to these prospects. The *Travelers* court found the "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state." (*Id.,* at p. 647.) It observed that "[t]he Association did not engage in mere isolated or short-lived transactions. Its insurance certificates, systematically and widely delivered in Virginia following solicitation based on recommendations of Virginians, create continuing obligations between the Association and each of the many certificate holders in the state." (*Id.,* at p. 648.) It based its decision in part upon the observation that "if

Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificateholders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska lawsuit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated." (*Id.*, at pp. 648-649.)

McGee v. *International Life Ins. Co., supra,* 355, U.S. 220, demonstrates that an insurance company's contact with the forum state need not be systematic and continuous if the lawsuit arises out of purposeful contact with the state. In *McGee* a California resident had purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. When International Life Insurance Company agreed to assume Empire's insurance obligations it mailed a reinsurance certificate to the insured, offering to insure him in accordance with the terms of the Empire policy. He accepted the offer and from that time until his death paid premiums by mail from his California home to International's Texas office. Neither Empire nor International had any office or agent in California and, on the record before the court, International had never solicited or done any insurance business in California apart from the policy involved therein. Nonetheless, the *McGee* court upheld California's jurisdiction over International: "Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. [Citations.] The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State

when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof. Often the crucial witnesses — here on the company's defense of suicide — will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but cetainly nothing which amounts to a denial of due process." (*Id.,* at pp. 223-224.)

Closer in some ways to this case than *Travelers* or *McGee* is a Third District case almost overlooked by the legal community. In *McClanahan* v. *Trans-America Ins. Co.* (1957) 149 Cal. App. 2d 171, Washington residents who were injured in a Shasta County automobile collision sued Trans-America Insurance Company for failure to pay the judgment recovered against its insureds. Defendant moved to quash, asserting that it was an Alabama corporation not qualified to do business in California, that it had written no insurance policies in the state, had no agents, jobbers or independent contractors who solicit business for it here, and maintained no office or place of business in California. Its only contact with the state was that it insured motorists who sometimes operated their vehicles in California and that under the terms of the policies it was obligated to investigate accidents in this state and employ attorneys, investigators and adjustors to adjust and negotiate claims, defend actions, and pay judgments arising out of actions against its policyholders in this state.

The policyholders in *McClanahan* were residents of Colombia, South America. After the accident, Trans-America employed an adjustment service agency to investigate the claims, engaged two doctors to examine plaintiff and/or testify at trial, and engaged attorneys to handle the lawsuit. In finding jurisdiction over the Alabama company, the court stated: "It could be said that from the very nature of defendant's business, the insuring of automobile owners, that whenever it issued a policy of automobile insurance, the defendant contemplated that the holder thereof might at some time be a user of the highways of this state, subject to all of the hazards of such use, and hence knew it would be necessary to come into the courts of this state to assert its rights and defend its obligations under such policies. . . . [W]e may note that by the very terms of the policy, it was the defendant insurance company which, upon notice of the accident, for all practical purposes became a real party in interest — it took over the complete control of all aspects of the case from a defense standpoint. In fact, had not the Galloways placed the entire case in defendant's hands to compromise or defend as it saw fit, such action on their part could well have resulted in a breach of the contract of insurance. The activities of the defendant under the circumstances shown cannot be gauged, as did the trial court, on the basis of one lawsuit or one visit by a corporate agent, or the fact that the defendant carried on no solicitation in this state." (*Id.*, at p. 174.)

Although *McClanahan* has rarely been cited and has not been applied by a California court, it has been characterized by a legal commentator as "the furthest extension of jurisdiction based on an isolated contract. . . ." (Comment, *Developments in the Law, State-Court Jurisdiction* (1960) 73 Harv.L.Rev. 911, 928.) Witkin reads *McClanahan* to suggest that an automobile insurance company is a "special type of foreign corporation [that] necessarily

does business in all the states, and cannot avoid jurisdiction . . . ." (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 121, p. 498.)

None of these insurance cases precisely mirrors O.I.L.'s contact with California, but each provides some insight into the considerations affecting the decision in this case. Many of the reasons for holding the out-of-state insurers subject to jurisdiction in *Travelers, McGee* and *McClanahan* apply equally to jurisdiction over the insurer for an oil company with significant assets and activities in California.

Before considering the specific contacts of O.I.L. with California, we note that "[a] distinction is made between a cause of action arising out of or in connection with a nonresident defendant's forum-related economic activity and a cause of action entirely distinct from that activity. When the cause of action *arises out of the forum-related economic activity*, the forum state will entertain jurisdiction over the nonresident defendant. An isolated act of economic activity, such as the making and performance of a contract in the forum state, may be sufficient to accord the forum state jurisdiction over the defendant when the cause of action is related to that isolated act of economic activity. [Citations.] Where, however, the cause of action is *entirely distinct from the forum-related economic activity*, the defendant cannot be sued in the forum state unless that economic activity has reached '. . . such extensive or wide-ranging proportions as to make the defendant sufficiently "present" in the forum state . . .' to support jurisdiction over him. [Citations.]" (*Sanders* v. *CEG Corp.*, (1979) 95 Cal.App.3d 779, 784.)

Here, the cause of action asserted against O.I.L. arises in part out of its forum-related activities — insurance of Shell's assets and activities in California. Thus, the eco-

nomic activity in California need not be extensive or wide-ranging.

Relying upon *Worldwide Volkswagen Corp.* v. *Woodson*, *supra*, and noting the forum-selection clause in its insurance contracts, O.I.L. argues that it did not anticipate being sued in California. But the question is not what O.I.L. *did* anticipate, but what it *reasonably should have* anticipated. Were the "defendant's conduct and connection with the forum State [ ] such that he should reasonably anticipate being haled into court there[?] [Citations.]" (444 U.S. at p. 297.)

Comparing O.I.L.'s contacts with those of insurers in *McGee* and *McClanahan*, it is apparent that jurisdiction over O.I.L. is warranted. In *McGee* the insurer's only contact with California was an insurance contract sent to a California resident, followed by the insured's payment of premiums. Here, the insurer has insured three major California-based oil companies and the California operations of numerous other companies. It has received over $145 million in premiums from the California companies and has made payments of over $25 million for California losses. The mere device of entering these contracts in Bermuda rather than mailing the agreements to the insureds cannot insulate O.I.L. from the impact of these activities upon California. Nor can O.I.L.'s forum selection clause ipso facto deprive insureds, beneficiaries, persons injured by the insureds' activities, or other potential plaintiffs of a California forum for suit. An insurer who derives such significant economic benefit from insuring California assets and activities must expect correlative burdens.

O.I.L.'s posititon is much like that of the insurer in *McClanahan* — it issued insurance with world-wide coverage and could reasonably have anticipated California losses. In fact, O.I.L. has much greater reason to expect

California losses because it insured stationary assets and activities located in California. It is true that O.I.L. made no agreement with the insureds to investigate and defend actions wherever they arose, as had the insurer in *McClanahan*. However, when losses have taken place in California, O.I.L. has asked adjustors to come to this state to investigate and negotiate, as any reasonable insurer would be expected to do. The mere fact that the contract did not oblige O.I.L. to send investigators or employ attorneys to defend actions in California does not make California's jurisdiction over O.I.L. unreasonable.

We conclude that the trial court erred in quashing service of process upon O.I.L. Let a peremptory writ of mandate issue directing the San Mateo County Superior Court to vacate its order granting O.I.L.'s motion to quash.[1]

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[1]An order granting a motion quash is appealable. (Code Civ. Proc., § 904.1, subd. (c).) However, under the circumstances of this case, appeal is not an adequate remedy. The court did not merely grant O.I.L.'s motion to quash. It also stayed Shell's action against the 250 insurance companies because of O.I.L.'s absence. The writ we issue will place the case back on the track and render moot Shell's pending writ petition challenging the trial court's stay order. (*Shell Oil Company* v. *Superior Court*, A032788.)

CERTIFIED FOR PUBLICATION

_____

Scott, J.

We concur:

_____

White, P.J.

_____

Merrill, J.

Filed: February 6, 1986

Decision of the Court of Appeal of
the State of California,
First Appellate District, Division Three,
Denying O.I.L.'s Petition for Rehearing

COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT DIVISION THREE

A.I.U. INSURANCE COMPANY, ET. AL

— V. —

SUPERIOR COURT COUNTY OF SAN MATEO
OIL INSURANCE LIMITED

A032845

San Mateo County No. 278953

BY THE COURT:

The petition for rehearing is denied.

Dated: March 5, 1986

White, P.J.

Order of the Supreme Court of the State of California
Denying
O.I.L.'s Petition for Review.

ORDER DENYING REVIEW AFTER JUDGMENT
BY THE
COURT OF APPEAL 1ST DISTRICT, DIVISION 3,
No. A032845

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

A.I.U. INSURANCE COMPANY ET AL.,
Petitioners;

—v.—

SUPERIOR COURT OF THE COUNTY OF SAN MATEO,
Respondent;

OIL INSURANCE LIMITED,
Real Party in Interest.

Petition for review of Real Party in Interest DENIED.

BIRD

Chief Justice

[File-stamped
May 21, 1986]

Decision of the Superior Court, County of San Mateo,
Granting O.I.L.'s
Motion to Quash Service of Process

SUPERIOR COURT, STATE OF CALIFORNIA,

COUNTY OF SAN MATEO

PRESENT: HON. WILLIAM LANAM, *Judge of the Superior Court*

No. 278953, *Shell Oil Company v. Accident & Casualty Insurance Co. of Winterthur et al.*

Motion of Plaintiff for reconsideration and Modification
of
the Court's Order staying further proceedings

(May 9)

Michael R. Nave (Ptf)
Thorn Rosenthal (Ptf)
William S. Boyd (Ptf)
Barry L. Bunshoft (Deft.)
(list of other attys present attached.)

Submitted May 9, 1985

MEMORANDUM DECISION

The Court has once again reviewed the exhaustive memoranda, so graciously provided by various counsel in the above proceedings, and continues to conclude that without the involvement of O.I.L. this Court will not be able to render either complete or adequate relief and the action shall not proceed. As indicated in its earlier order, if O.I.L. is unwilling to voluntarily submit to the jurisdiction of the Court, then Shell should proceed by way of its

contractual arbitration prior to continuation of the present proceedings.

Further clarification of this Court's prior order appears necessary and in order that all issues might be resolved, the Court does conclude that it does not have personal jurisdiction over O.I.L. and that the motion to dismiss the cross-complaints against said corporation are granted. In support of said conclusion, the Court does find that it cannot ignore the London Forum selection/arbitration clause in the agreement between Shell and O.I.L., and that the documents and stipulations presented during the course of the proceedings do not support or provide a basis for finding "minimum contacts." It was thought that the above findings were implicit in the earlier rulings by the Court setting forth the stay. However, questions remained and the issue had to be met to facilitate any desired appellate review. The Court does amend its prior order to include a dismissal of the cross-complaints against O.I.L.

Defendant's request for attorneys fees under Section 128.5 is denied.

Attorneys for plaintiff shall prepare an order consistent with the findings and orders of this Court.

Dated: August 8, 1985

/s/ WILLIAM LANAM
William Lanam
Judge of the Superior Court

Order of the Superior Court, County of San Mateo, Granting O.I.L.'s Motion to Quash Service of Process

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

No. 278953

SHELL OIL COMPANY,

Plaintiff,

v.

ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR, et al.,

Defendants.

Order Staying Proceedings and Granting Motion to Dismiss Cross-Complaint Against O.I.L. Ltd.

This Court having reviewed the memoranda submitted on Shell's motion for reconsideration and the Court having heard the arguments of counsel at the hearing thereon on May 9, 1985, and,

This Court having concluded in its decision dated August 8, 1985 that without the involvement of O.I.L. this Court will not be able to render either complete or adequate relief and the action should not proceed,

IT IS ORDERED that:

1. All present proceedings are stayed pending either the submission by O.I.L. to the jurisdiction of this Court in the present proceedings or completion of London arbitration proceedings between Shell and O.I.L.; and

2. The cross-complaints against O.I.L. are dismissed because of the presence of the London forum selection/arbitration clause in the agreement between Shell and O.I.L. and because of the absence of minimum con-

tracts between O.I.L. and California sufficient to establish personal jurisdiction over O.I.L.

DATED: September 17, 1985

/s/ WILLIAM LANAM
William Lanam
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 27, 1986, I served the within Brief in opposition to Petition for a Writ Of Certiorari in re: "Oil Insurance Limited v. Superior Court of the State of California, County of San Mateo" in the United States Supreme Court, October Term 1985, No. ;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 27, 1986, at Los Angeles, California

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